

IN THE
SUPREME COURT OF THE UNITED STATES
SITTING IN LEWIS HALL
October Term, 1990

NO. LH90-111590

AUGUSTUS O. HOWARD FEED COMPANY, INC.,
Petitioner,

v.

BAYOU FEED COMPANY, INC.,
Respondent.

On Appeal from the State of Lewis Hall
Supreme Court

Brief for Petitioner

Issue #1 Graves
Issue #2 Phelps
Counsel for Petitioner

QUESTIONS PRESENTED

- I. Whether the District Court erred by imposing sanctions in the form of attorney's fees, expenses and costs against Howard and West pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. Section 1927 when directly conflicting state law prohibits the imposition of such sanctions?

- II. Whether the trial court erred by imposing additional attorney's fees sanctions against Howard pursuant to the court's inherent powers when directly conflicting state law prohibits the imposition of such sanctions?

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BAYOU FEED COMPANY, INC., Respondent.

Brief for Petitioner

STATEMENT OF THE CASE

On January 25, 1990, Augustus O. Howard, owner of Howard Feed Company (hereinafter "Howard"), signed a contract with Bayou Feed Company (hereinafter "Bayou") to purchase a feed processing plant. Bayou assured Howard that its plant had a capacity of 6 tons per month, and the contract stipulated the plant's equipment was only four years old.

Two days after finalizing the deal with Bayou(January 27, 1990), Howard "learned of the availability of a cheaper plant [and] sought to avoid performance of its contractual obligations with Bayou." Howard Feed Co., v. The Bayou Feed Company, Inc., 1022 F. Supp. 1 (D.L.H. 1990). Howard planned to void the sale by claiming misrepresentation on the part of Bayou. To accomplish this, he falsified an Industrial Engineer's Report to show the Bayou plant did not produce at the capacity originally assured by Bayou.

Howard retained Attorney Rosemary West on January 28, 1990. He gave her the report without telling her of its falsity, and instructed her to file suit if Bayou refused to rescind the contract. West contacted Bayou on January 29th and informed them of the report and its implications, but Bayou refused to rescind. On February 7, 1990, Howard brought an action in Lewis Hall state court for rescission of the contract based on allegations of fraud. Howard Feed Co., v. Bayou Feed Company, Inc., 22 F.3d 1 (15th Cir. 1990). On February 28, 1990, Bayou successfully removed the action to Federal District Court on the basis of diversity. Id. After removal to the District Court, Howard submitted a second falsified report to West and instructed her to file an amended complaint. The "Economic Report" claimed the plant equipment was 20 years older than the four years stipulated in the contract. On March 3, 1990, West signed and filed an amended complaint alleging that Bayou misrepresented both the production capacity of the plant and the age of its equipment. Howard, 1022 F. Supp. at 3.

On March 17, 1990, Bayou answered the amended complaint. They denied the allegations of misrepresentation, moved for dismissal for failure to state a claim and requested the Court impose sanctions against both Howard and West

pursuant to Federal Rule of Civil Procedure 11, 28 U.S.C. Section 1927 and the court's inherent powers. Howard, 22 F.3d at 1. The trial judge dismissed the action and imposed sanctions of \$3,500 against West and \$100,000 against Howard. Id. Howard did not appeal the dismissal, but both Howard and West appealed the imposed sanctions. The Appellate Court affirmed.

SUMMARY OF THE ARGUMENT

I.

The District Court sitting in diversity erred when it applied Federal Rule of Civil Procedure 11 over Lewis Hall Rule of Civil Procedure 420. Rule 11 violates subsection (b) of 28 U.S.C. Section 1927, the Rules Enabling Act, by abridging a represented party's substantive state and Constitutional right to a separate jury trial before monetary sanctions can be imposed upon that party. Rule 11 also violates subsection (b) in that it deprives an attorney, admitted to practice law in Lewis Hall, of his/her right to be treated equally as a member of the Lewis Hall State Bar Association. Furthermore, imposition of monetary sanctions against an attorney under 28 U.S.C. Section 1927 is not warranted unless the court makes a dispositive finding that the attorney's conduct "vexatiously and unreasonably multiplied the proceedings."

II.

The Erie doctrine requires a federal court sitting in diversity to apply state common law. The common law at issue here, allowing the awarding of attorney's fees only when a contract or statute specifically provides for them, is substantive law. Therefore, state law, rather than federal procedure rules, is applicable and attorney's fees may not be awarded.

If the court finds the award of attorney's fees to be procedural, state law is still controlling because, under the Byrd balancing test (as modified in Hanna), state procedural law is applied if it is outcome determinative. No overriding federal concern outweighs the dangers of "inequitable administration of the laws" and "forum shopping."

ARGUMENT

In performing the analysis necessary to determine whether state or federal law will be applied to resolve this situation, the court is not bound by any prior decision's made regarding this case.

Whether state or federal law applies in a diversity action is a question of law...which we review de novo.... Our de novo review extends to the district court's construction of state law.

Olympic Sports Products, Inc. v. Universal Athletic Sales Co., 760 F.2d 910, 912 (9th cir. 1985). Thus, as the court is quite aware, the facts in this case may, in fact should, be reviewed in their entirety.

When the District Court states that "in applying these sanctions, this court sees no need to refer to Lewis Hall state law," the Supreme Court may determine that is an incorrect construction of applicable law and proceed accordingly. Howard Feed Co. v Bayou Feed Co., 1022 F. Supp. 1, (D.L.H. 1990).

I. THE DISTRICT COURT ERRED BY IMPOSING SANCTIONS IN THE FORM OF ATTORNEY'S FEES, EXPENSES AND COSTS AGAINST HOWARD AND WEST PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 11 AND 28 U.S.C. 1927 WHEN DIRECTLY CONFLICTING STATE LAW PROHIBITED THE IMPOSITION OF SUCH SANCTIONS.

A. The District Court Erred By Imposing A Sanction of \$50,000 in Attorney's Fees Against Howard Pursuant to Federal Rule Of Civil Procedure 11 When A Conflicting Substantive State Statute Existed Which Did Not Allow Attorney's Fees To Be Imposed Upon A Represented Party When That Party's Attorney Failed To Make A "Reasonable Inquiry" Before Signing A Motion

When a Federal Court sitting in diversity is presented with an issue purportedly covered by both a federal and a state rule, the first question which must be addressed by the court is whether or not the scope of the federal rule is "sufficiently broad" to cause a "direct collision" with the state rule. Burlington Northern R.R. v. Woods, 480 U.S. 1, 4-5 (1986) (restating initial step of test as set forth in Hanna v. Plumer, 380 U.S. 460, 471-472 (1964)). The rules in question here are Federal Rule of Civil Procedure 11 (hereinafter Rule

11) and Lewis Hall Rule of Civil Procedure 420 (hereinafter Rule 420). The difference between the rules is seen in the last sentence of Rule 420:

[i]f a pleading, motion or other paper is signed in violation of this rule, the court upon motion or upon its own initiative shall impose only upon the signer the sanction of recommending to the Lewis Hall State Bar Association's Ethics Review Committee appropriate disciplinary action. No court may impose any sanction other than that provided for in this rule (emphasis added).

Lewis Hall Rule of Civil Procedure 420.

The direct conflict here is that Rule 420 does not allow a represented party to be sanctioned, nor does it allow the imposition of monetary sanctions. Once a conflict is found to exist, the choice of law decision to be made by a federal diversity court is governed by 28 U.S.C. Section 2072, otherwise known as the Rules Enabling Act (hereinafter REA).

The two-part test to be applied by the court in testing the validity of a Federal Rule is implicit in the language of the statute. The first question to be answered under the REA is whether the Federal Rule "really regulates procedure." In subsection (a) of the REA Congress granted the Supreme Court power to "prescribe general rules of practice and procedure...for cases in the United States district courts." A rule enacted by the Supreme Court pursuant to the REA passes Constitutional "muster" if it can be described as "procedural." Hanna, 380 U.S. at 464.

The general purpose, and perhaps the most important goal of Rule 11 is to deter perceived abuses in the conduct of civil litigation by closely regulating a specific area of an attorney's responsibility. Burbank, "The Transformation of American Civil Procedure: The Example of Rule 11," 137 U.Pa.L.Rev. 1925, (1989). Since Rule 11 regulates matters that can be classified as procedural, namely the signing of pleadings, motions, etc, it easily satisfies the first part of the test.

We are primarily concerned with the second part of the test. According to subsection (b) of the REA, a federal rule may be overridden by a state rule if it "abridges, enlarges or modifies any substantive right." If a substantive right is found to exist, it must be so bound up in the substantive policy of the state

that failure to enforce the rule creating that right would unfairly discriminate against the citizens of the forum state. As stated by the court in Guaranty Trust Co. v. York, 326 U.S. 99, 112 (1944), "the source of substantive rights enforced by a federal court under diversity jurisdiction...is the law of the States...Whenever that law is authoritatively declared by a State...such law ought to govern in litigation founded on that law." The Lewis Hall Supreme Court has declared that Rule 420 was enacted to remove the impediment, faced by potential litigants at the Federal level, of immediate monetary sanctions, and to "ensur[e] that...represented parties, accused of bringing frivolous claims receive a jury trial before any attorney fee liability can be imposed." Howard Feed Co. v. Bayou Feed Co., 22 Fed.3d 1, 4 (15th Cir. 1990).

Parties represented by attorneys in Lewis Hall should retain the right described by the Lewis Hall Supreme Court whether or not their cause of action remains in state court or is removed to a federal court. "Erie guarantees a litigant that if he takes his state cause of action to a federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court." NASCO, Inc. v. Calcasieu Television and Radio, 894 F.2d 696, 711 (5th Cir. 1990).

The importance of encouraging uniform outcomes has been underscored by court decisions since Erie, many of which have stressed that "the outcome of the litigation in the federal court should be substantially the same...as it would be if tried in a State court." York, 326 U.S. at 109. (See also, Byrd v. Blue Ridge Cooperative, 356 U.S. 525, 536-7 (1957), stating that "federal courts should conform as near as may be...to state rules even of form and mode where the state rules bear substantially on the question whether litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular federal rule"). In the case at bar, it is apparent that had defendants not removed this case to federal court, Howard would not have been susceptible to sanctions under Rule 420 in Lewis Hall State Court.

Under Rule 11, Howard is liable for sanctions in the form of attorney's fees "because his attorney, West, in signing the Amended Complaint did not make

the requisite "reasonable inquiry." Howard, 1022 F. Supp. at 7. His own misconduct is not a deciding factor. Lewis Hall has implemented a system whereby a victorious party to litigation who wishes to recover attorney's fees must file an action directly against the alleged violative party under a separate statute. In this manner, the alleged "malicious prosecution" can be judged by the initiating party's own misconduct. Howard's right to a separate trial is not only a state-created right, but a Constitutional right embodied in the 7th Amendment. Since this right will not be preserved if the federal court applies Rule 11, The Rule must be deemed to violate subsection (b) of the REA and cannot be given effect.

B. The District Court Erred By Imposing Sanctions In The Form Of Excess Costs Against West Under Rule 11 When Rule 420 Guaranteed Her A Substantive Right Not To Bear A Monetary Penalty And To Be Sanctionned In A Manner Equal To Other Lewis Hall Attorneys.

The initial question of whether or not a conflict exists must be revisited since we are confronted with a different factual scenario. Prior courts faced with making a choice between state and federal rules have recognized that application of a state rule in lieu of a conflicting federal rule may pose a threat to the uniformity of the federal procedure. Hanna, 380 U.S. at 463. The court addressed this issue in Burlington, 480 U.S. at 1. In Burlington, the court held that the conflict between the state and federal rule was the discretionary nature of the federal rule to award damages upon determining that an appeal was frivolous, versus the mandatory mode of the state rule. In choosing between two procedural rules driven by similar purposes (penalizing frivolous appeals and compensating delays), and imposing similar monetary sanctions, the court held that the state rule was purely procedural, i.e., did not reflect any substantive state rights and therefore need not be applied.

Our case can be distinguished from Burlington in that the mode of operation of both the state and federal rule is mandatory. Furthermore, the Federal Rule in Burlington affected only the process of enforcing litigants' rights, and not the rights themselves. Id., at 4-8. In our case, the federal rule calls for a

"reasonable sanction" to be imposed; the state rule merely defines what that reasonable sanction is. A federal court sitting in diversity can apply the state rule within the discretionary guidelines of the Federal Rule and thus still maintain the integrity and uniformity of the federal system. Id., at 5.

If the court finds that disallowance by Rule 420 of monetary sanctions against an attorney does create a conflict with Rule 11 and requires further analysis under the REA, Rule 420 will still champion application of Rule 11. Under Rule 420, West is subject to disciplinary action by the Lewis Hall State Bar Association's Ethics Committee if she is found to have violated that rule by not making a "reasonable inquiry" before signing Howard's amended complaint. This is the only sanction allowed by the rule. Any attorney in Lewis Hall who violates this rule goes before the same Ethics Committee and is never subject to monetary penalization. West has the right, as accorded to her by the state, to be treated in a manner equal to every other attorney admitted to practice law by the Lewis Hall State Bar Association. Since this right is abridged by the provisions of Rule 11 as applied by the District Court, Rule 11 cannot stand under subsection (b) of the REA.

C. The District Court Erred By Imposing Monetary Sanctions Against West Under 28 U.S.C. Section 1927 Because Her Actions Did Not Satisfy The Standard Of Sanctionable Conduct Required By The Statute.

Under a Lewis Hall Statute, "when any attorney...admitted to conduct cases in any Lewis Hall State Court so multiplies the proceedings in any case, unreasonably and vexatiously, the court shall recommend that the Lewis Hall State Bar Association's Ethics Review Committee take disciplinary action against that attorney." 59 L.H.C. Section 1500. Although this state statute conflicts with the federal statute, which allows monetary sanctions, the federal statute automatically applies because of the Supremacy Clause. The power to assess costs against an attorney pursuant to 28 U.S.C. Section 1927 has been held to be a power that must be strictly construed. Dreiling v. Peugeot Motors of America, Inc., 768 F.2d 1159 (10th Cir. 1985). The court in Dreiling imposed fees upon an attorney who commenced an action without grounds, maintained the litigation when

it was clear that there was no factual basis, and sent a threatening letter to opposing counsel. This type of misconduct is much more disruptive than any that West has engaged in.

In Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1969), the court held that only "instances of serious and studied disregard for the orderly process of justice" warrant imposition of costs under 28 U.S.C. Section 1927 by the court. The misconduct engaged in by the attorney in Keifel included tactics so harassing and obstructionist that a new trial was required. The attorney's persistence in seeking postponements of the new trial was characterized by the court as "intentional, [and] involving serious breaches of the Canons of Ethics. Id., at 1167.

Defendants Bayou and the District Court improperly used a standard of "reckless disregard" in finding West guilty under 28 U.S.C. Section 1927. It is clear that they have not shown that West deliberately delayed the progress of the case. While her failure to investigate the reports before amending Howard's complaint may indicate incompetence, this failure does "not rise to the level of egregious behavior required to merit an award of attorney's fees to the defendants." Piljan v. Mich. Dept. of Social Services, 585 F.Supp. 1583 (E.D. Mich. 1984). The facts in Piljan are very similar to those in the case at hand. The attorneys failed to "critically examine the merits of the case and fully inform themselves of the facts before they went to trial." Id. Although the court found that "the real problem with this case is that it was filed at all," the attorneys conduct was not considered "dilatory litigation practice" and was therefore not sanctionable.

The underlying purpose of 28 U.S.C. Section 1927 is to "curb dilatory practice and the abuse of court processes by attorneys." Tedeschi v. Smith Barney, Harris Upham & Co., 579 F.Supp. 657, 661 (S.D. N.Y. 1984). The court in Tedeschi goes on to describe behavior that "transgresses both Rule 11 and section 1927 of Title 28." This includes: failure to attend court on time and to adhere to stipulations, making of frivolous motions seeking reargument of decided motions, and actions taken "simply for the sake of burdening an opponent with

unnecessary expenditures." Id., at 663. West did not file the amended complaint with the intent to harass or burden Bayou, but to follow through with what she believed at the time to be a valid complaint.

Since there has been no finding, and the defendants do not suggest, that West deliberately delayed the progress of the case, West cannot be found, as a matter of law, to have "vexatiously and unreasonably multiplied the proceedings." In reviewing the legislative history behind 28 U.S.C. Section 1927, the court in Overnite Transportation Co. v. Chicago, 697 F.2d 789 (7th Cir. 1983) found it to reveal a congressional intent to impose sanctions only upon those attorneys who needlessly delay ongoing litigation. In Overnite, the frivolity of the claim was alleged to be so clear that it would be apparent to even a law school student. Although the basis for the filing of the lawsuit, and the appeal from its dismissal, were found to be "legally incorrect," the court did not find this to be "vexatious" conduct "intended to harass" since the attorneys had a reasonable, albeit incorrect, belief that there was a sufficient basis for the claim, and since they prosecuted the suit in an orderly and timely fashion.

In West's case, there is no evidence to indicate that she pursued the complaint after the defendant's motion to dismiss was granted. Her appeal was only for the imposition of attorney's fees. Her "reasonable belief" that the complaint had merit stemmed from the fact that Bayou's attorney never indicated the falsity of the report (he only denied the allegations), and from defendant's removal of the case to the federal court. If it was so clear, as alleged by Bayou, "that minimal investigation and inquiry into readily available information would have revealed the falsity of the [Reports]", why did they not file a motion to dismiss after the initial complaint? Howard, 1022 F. Supp. at 6.

Although her actions may have resulted in an "unintended inconvenience to the court," the standard of 28 U.S.C. Section 1927 makes it clear that nothing short of "an attorney's intentional departure from proper conduct" should make her liable for costs. United States v. Ross, 535 F.2d 346 (6th Cir. 1976). The District Court erred in finding West's conduct within the ambit of the statute.

II. THE APPELLATE COURT ERRED BY AFFIRMING THE TRIAL COURT'S IMPOSITION OF ADDITIONAL ATTORNEY'S FEES SANCTIONS AGAINST HOWARD PURSUANT TO THE COURT'S INHERENT POWERS BECAUSE STATE LAW DIRECTLY PROHIBITS THAT SANCTION.

No question exists as to whether or not Lewis Hall state law conflicts with the courts desire to impose sanctions on Howard under its inherent powers. However, upon the Court's review of the principles espoused in it's landmark Erie decision, the Court will realize the substantive policy behind the law of the State of Lewis Hall controls this situation and declare the court's inherent powers to impose attorney's fees inapplicable here.

The Erie Doctrine requires a federal court sitting in diversity to apply substantive state common law rather than federal procedural law. However, if state procedural common law is at issue, the federal court will apply federal procedural law unless the state procedure in question can be shown to be outcome determinative. If the state procedural common law is outcome determinative, it will be applied by the courts unless an overriding federal concern is shown.

The state common law at issue in the present case will be shown to be substantive. If the court disagrees and finds the common law issue to be procedural, it will be shown that it is outcome determinative and, as such, should still be applied. It will also be shown that no overriding federal concern exists.

A. The Erie Doctrine Must Be Applied By the Federal Court Sitting in Diversity to Resolve the Directly Conflicting Lewis Hall Common Law of Denying Attorney Fees and the Common Practice of Federal Courts of Awarding Them Under an "Inherent Powers" Rationale.

The United States Supreme Court held in its landmark case of Erie RR. Co. v. Tompkins, 304 U.S. 64, 78 (1938) that

except in matters governed by the federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a

statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

In issuing the Erie decision, the Court thoroughly examined the Judiciary Act of 1789 which forms the basis of the modern Rules of Decision Act and interpreted it to apply to common law as well as state statutory law.

The Court provided an even more detailed explanation of the implications of Erie nine years later in Angel v. Bullington, 330 U.S. 183, 191-192 (1947).

The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If [a state] has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment.... [D]iversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld (emphasis added).

In the case at bar, Lewis Hall has withheld the awarding of attorney's fees. Following Angel, a federal court in Lewis Hall "cannot give that which [Lewis Hall] has withheld."

The Appellate Court's assertion that the Rules of Decision Act grants them inherent powers that allow them to ignore "... an asserted rule of state law ... established with sufficient definiteness and finality" is in complete violation of the standard set by the Supreme Court in Erie. Erie (Argument for the Petitioner) 67.

In fact, a review of the Supreme Court case responsible for creating the concept of "inherent powers" demonstrates the limited scope and shows that application of "inherent powers" in this situation would be stretching the concept beyond where the court intended it to go.

The United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812), was an early case focusing on jurisdiction and the proper role between the legislature and the courts. The court declared, "the legislative authority

... must... make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence." However, the court went on to acknowledge the existence of inherent powers by saying,

certain implied powers must necessarily result to our courts of justice from the nature of their institution.... To fine for contempt -- imprison for contumacy--enforce the observance of order, &c., [sic] are powers which cannot be dispensed with in a court because they are necessary to the exercise of all others... (emphasis added).

Id. The awarding of attorney's fees, under the facts in the given case, does not fall into the category of sanctionable activity the court has reserved for itself under its definition of inherent powers. The power to award an attorney's fee sanction is not "a power necessary to the exercise of all others."

No federal procedural law exists concerning the courts "inherent powers;" they exist because they were "created" by the Court in Hudson. Federal courts sitting in diversity are prohibited from imposing their own common law. (Erie found "federal common law" did not exist). Accordingly, a federal court sitting in diversity is compelled to apply whatever "inherent powers" are recognized by the state common law in the state in which they sit -- not "inherent powers" federal courts have created and recognize in their own federal jurisdiction. The federal court is therefore prohibited from imposing attorney's fees as a sanction pursuant to the common law created by the State Courts of Lewis Hall.

Lewis Hall common law explicitly "allows for attorney's fees only when a contract or statute specifically provides for them ... [and] does not recognize an exception for bad faith practice." Giove v. Campbell, 872 L.H.3d 1650, 1652 (1989). McCool Films and Other Novelties v. Marlow Rubber and Doll Co., 646 L.H.3d 750 (1989), provides a detailed explanation of the reasons behind the States prohibition of attorney's fees awards.

....[T]he Lewis Hall State Legislature sought to impose a vastly different system of policing the courtroom than that used under the federal

system....The practical result of [the] policy is to force the victorious party in a litigation, who seeks to recover attorney's fees and expenses from the losing party, to file a separate action for malicious prosecution...The state has attempted to...[ensure] that those represented parties accused of bringing frivolous claims receive a jury trial before any attorney fee liability can be imposed.

...Unlike the federal system, however, the state has sought not to create monetary liability for its attorneys. The punishment of an attorney is left solely in the hands of the State Bar Association who admitted them to practice. By so doing, the state has sought to create a uniform system of disciplinary measures for attorneys, instead of the case by case system of attorney sanctions currently used in the federal system.

Id. The action of the District Court in awarding attorney's fees sanctions is in direct conflict with Lewis Hall State policy. As stated earlier, when a federal court sits in diversity and finds that state common law conflicts with the law it would apply, it is required, under Erie, to apply the state common law. The only exceptions to this requirement are decisions concerning "procedural rules."

B. The Issue of Awarding Attorney's Fees Is One of Substantive Law; Therefore, No Further Analysis Is Necessary. The Court Is Required, Under Erie, To Apply State Common Law.

A number of courts have recently addressed the issue of whether the awarding of attorney's fees is a substantive or procedural area of the law. In In re American United Inns, No. 74-2265, slip op. at 12 (Bankr. S.D. Ohio July 28, 1980), the question of whether allowing attorney's fees from a bankruptcy estate was a substantive matter or a procedural matter was raised. Since no on-point bankruptcy law existed, the Judge in this instance turned to cases concerning the same issue in other jurisdictions.

[T]he rationale of the Supreme Court expressed in three cases decided just last month, none related to bankruptcy law, suggests to this reader that the Supreme Court generally looks upon the award of attorney's fees as a substantive rather than a procedural matter... (emphasis added).

Id. The In re American decision continues by quoting Justice White's Alyeska footnote.

In Alyeska the Supreme Court touched upon the substantive/procedural dichotomy at footnote 31 stating in pertinent part: 'prior to the decision in Erie ... this court held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts: ... It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts. People of Sioux County v. National Surety Co., 276 U.S. 238, 243 (1928).... We see nothing after Erie requiring a departure from this result.'

Id., quoting Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 262 (1975). The Bankruptcy Judge takes the further step of analyzing Justice White's footnote.

Because Erie required observance of state substantive law in federal courts, but not of state procedural law, and because the Supreme Court by expressly stating that it would have applied the state statute regarding attorneys' fees in People of Sioux County even if the case had arisen after Erie, it follows that the Court viewed the state statute granting a right to attorneys' fees as a substantive right. Logically it should follow also that if the state statute had forbidden attorneys' fees that the Supreme Court would have viewed the matter as substantive (emphasis added).

Id.

The United States District Court for the Eastern District of Pennsylvania has interpreted the Alyeska footnote in the same way. "The issue is whether entitlement to attorney's fees is "substantive," governed by the parties choice of law, or "procedural" and governed by the law of the forum. Under Erie, ... in diversity actions liability for fees is ordinarily considered substantive." Van Muching & Co. v. M/V Star Mindanao, slip op. No. 82-1092 (E.D. Pa. June 4, 1986) quoting Alyeska, 421 U.S. 259 n.31.

In the Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), decision, The Supreme Court expanded its definition of "inherent powers" to include the awarding of attorney's fees. Although this was strictly a federal issue (ie.

not based on diversity and therefore not on-point for the case at bar), it is worth noting that neither Mr. Justice Stewart nor Mr. Justice Rehnquist joined in the "inherent powers" part of the opinion. "[T]hey view that question as a substantial issue that should be addressed by the District Court on remand." Id. at 764. Thus, two members of the Supreme Court did not find it proper to instruct its own lower level federal court on the award of attorney's fees (plus Justices Stevens and Burger who dissented on the entire opinion.) It is worth noting here that only five Justices found it appropriate to instruct their own lower level court on the awarding of attorney's fees. In this case, the Court is being asked to not only instruct a court sitting in a different forum on the awarding of attorney's fees, but also to award attorney's fees contrary to established state policy and state law. Erie and its progeny forbid this interference.

C. Even If The Court Finds The Issue of Awarding Attorney's Fees To Be Procedural In Nature, The Court Is Still Required To Apply State Law Because The Rule Is "Outcome Determinative" As Defined By Byrd And Modified By Hanna.

Berry v. Eagle-Pitcher, 88 Civ. 10631, memorandum op. (N.D. Ill. June 26, 1989), presents the latest "balancing" analysis. The question in Berry concerns the allowance of punitive damages rather than the award of attorney's fees, but the analysis is the same. "The issue is whether this Illinois statute is properly viewed as substantive or procedural." Id. at 2. Berry nicely summarizes both the well-established "Byrd balancing test" and the modifications to it made by Hanna.

[F]ederal courts invoke an "outcome" determinative test when considering whether a state law is best viewed as substantive or procedural. Byrd, 356 U.S. 525; Hanna, 380 U.S. 460. The outcome determinative test must be applied in conjunction with the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880, 884 (1st Cir. 1982) citing Hanna....

Id. at 2. Applied to the case at bar, an out-of-state litigant could force "inequitable administration of the laws" by removing a case to federal court on the basis of diversity. The in-state litigant, under Lewis Hall state law, does not risk the award of attorney's fees; to require the in-state litigant to accept that risk simply by removing his case to federal court is inequitable and discourages a Lewis Hall citizen from exercising his right to sue an out-of-state defendant. A citizen has a basic substantive right (as described in the first issue) to expect the same treatment others receive for the same actions. Allowing a federal court sitting in the state of Lewis Hall to impose sanctions strictly prohibited in the state courts of Lewis Hall is to allow "inequitable administration of the laws." Hanna requires a court to consider this before determining whether or not a federal procedural rule may be applied contrary to state procedural law.

The second part of the modified Byrd test concerns "forum-shopping." Once a serious problem in litigation cases, Erie was explicitly interpreted to discourage this practice. Allowing the federal courts to distinguish themselves in such a prominent way from the state courts (the award of attorney's fees can reach into the hundreds of thousands of dollars) would again result in serious forum-shopping. To ignore a "twin-aim" of Erie in such a way is to ignore the essence of the Erie decision completely. Since the court has not overruled Erie (has, in fact, affirmed it repeatedly), ignoring it in this instance was error on the part of both the District and Appellate courts. Under the modified balancing test espoused in Hanna, the Lewis Hall procedural rule of not awarding attorney's fees must be followed by the federal court sitting in diversity.

- D. The Awarding of Attorney's Fees Does Not Protect An Overriding Federal Concern And Therefore May Not Be Imposed On State Courts In Disregard Of State Substantive, Or Outcome Determinative Procedural Laws.

Whether or not the question of the existence of an over-riding federal concern is a legitimate extension of the Byrd and Hanna tests has not yet been

decided. Professor Martin H. Redish and Mr. Carter G. Phillips are of the opinion that, "the Hanna test should be discarded [I]t diverts attention from the far more significant conflict between state interests and the need for certainty in the law on one hand, and the interest of the federal judicial system on the other." "Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma," 91 Harvard law Review 356, 401 (1977).

Redish and Phillips' "refined balancing test" has not yet replaced the modified Hanna test as the applicable analysis in Rules of Decision Act cases. However, the dicta from several courts show a tendency to look at the overall questions of federalism as it relates to the specific facts at issue.

The 1987 case of Tobin v. Greenberg 659 F. Supp. 959 (S.D.N.Y. 1987) is an example of a federal court sitting in diversity, examining and choosing to apply federal law rather than state law because of the importance of the federal concern in question. The court found that the federal policy favoring jury determination of disputed facts, and the commands of the Seventh Amendment, displace the rule in Licari in diversity litigation Id. at 964. The rule in Licari that the federal court displaces concerns the New York legislature's "no fault" law. In Licari v. Elliot, 57 N.Y.2d 230, 455 N.Y.S.2d 570, 441 N.E.2d 1088 (1982), the New York Court of Appeals had upheld the delegation of certain fact determinations to the Judge rather than the Jury on the basis of "assuring prompt and full compensation for economic loss by curtailing costly and time-consuming court trials." Tobin, 659 F. Supp. 962. The Tobin court explains "the [Licari] rule was designed specifically with crowded New York state court dockets in mind. Id. at 964.

Licari is easily distinguished here by understanding that the Lewis Hall state rule was designed specifically with the rights of Lewis Hall citizens in mind rather than for court administration purposes. Lewis Hall courts have found that the threat of attorney sanctions discourages potential litigants from attempting to assert their rights, specifically in Civil Rights cases. When weighed against the Federal Court's "administrative purposes" for wanting to impose attorney sanctions, the opposite of Tobin occurs. No constitutional

right is involved. A substantively/procedural state right must be balanced against a federal "housekeeping matter."

Even if the court chooses to apply the "refined balancing" test that has been suggested, the weight on the scales would not shift. The federal concern over the power of the court to impose attorney's fees does not "override" the policy decision made by Lewis Hall; thus, Lewis Hall state law must be applied and attorney's fees may not be awarded.

CONCLUSION

For the reasons set forth above, we respectfully request this Court to reverse the rulings of the District Court and Court of Appeals, and to find that a federal court sitting in diversity may not impose attorney's fees sanctions under F.R.Civ.P. 11, 28 U.S.C. Section 1927 or the "inherent powers" of the court when directly conflicting state law exists.

Respectfully submitted,

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